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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CLARENCE TURNAGE
Petitioner

- v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the failure by the Trial Court to find that a conspiracy existed, Petitioner was part of the conspiracy, and statements made were in furtherance of the conspiracy, prior to or after the co-conspirator testified, was violative of Federal Rule of Evidence 104(a) and the holding of Bourjaily v. U.S., 47 U.S. 171, 97 L.Ed. 2d 144 (1987).

2. Whether the trial of alleged co-conspirators should be severed where evidence of guilt and defenses of the parties are wholly different.

3. Whether evidence seized in violation of the Fourth Amendment of the U. S. Constitution should be excluded from evidence at trial.

4. Whether the Defendant has the burden of proving a vehicle search was not a routine inventory, pursuant to South Dakota v. Opperman, 428 U.S. 364 (1976).

5. Whether the Court erred by not holding a hearing on objected to material included in the presentence report when it failed to state that the material would not be used in its sentencing decision.

LIST OF PARTIES

Clarence Turnage,

Petitioner

United States of America,

Respondent

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner herein prays that a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit to review that Court's November 6, 1990 Judgment and Order in this proceeding.

OPINIONS BELOW

The judgment of the Court of Appeals, which was not reported, is attached hereto. Also attached hereto is the judgment of the United States District Court for the Eastern District of Kentucky, entered March 7, 1990.

JURISDICTION

The Court of Appeals had appellate jurisdiction over the District Court's final judgment in this criminal case, pursuant to 28 U.S.C. Section 1291. The panel's order was entered on November 6, 1990. Consistent with this Honorable Court's Rule 13, this Petition is timely filed.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

United States Constitution

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

All persons born or naturalized in the United Sates, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL RULES OF EVIDENCE

Rule 104(a)

Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the

existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Rule 801(d)(2)(E)

Statements Which Are Not Hearsay. A statement is not hearsay if--

(2) Admission by Party-Opponent. The statement is offered against a party and is... (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 14

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements

or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Rule 32(c)(3)(D)

If the comments of the defendant and his counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegations, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission.

Rule 52(b)

Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

As the result of a government (DEA) sting operation, a federal grand jury returned indictments for Petitioner Clarence Turnage, Floyd Garr, and Fred Griffin on August 16, 1989. This government sting operation began with Howard Pargen, who agreed to cooperate with the government and lure others into drug operations in exchange for a reduction of his own sentence. Apparently, Pargen met Floyd Garr (hereinafter, Garr) and conveyed to him that he had a large quantity of cocaine to be sold and was looking for buyers. Shortly thereafter, a series of meetings were held between the two. Further, Pargen was equipped with sound recording

devices, and, at no time, did any of these devices record any conversation involving Turnage or the mention of his name.

Pargen, informant, arranged a meeting between Garr and James Malone, an undercover DEA agent, wherein Garr was to purchase a large quantity of cocaine for the sum of $45,000. The proposed location of this meeting was changed from the McDonald's Restaurant in Lexington, Kentucky, to the Winchester, Kentucky McDonald's, because of high police activity, according to Malone's testimony. Shortly thereafter, Garr and codefendant Fred Griffin (hereinafter, Griffin) drove a GMC truck to the McDonald's parking lot in Winchester, Kentucky.

Upon arrival at the McDonald's, Garr was observed by a cadre of police surveillance units, exiting his vehicle with nothing in his hand, returning from the store carrying a paper bag, and reentering the vehicle with Griffin. Coincidentally, Turnage entered the parking lot of McDonald's in Winchester. While looking for a parking space, he observed, in his rear view mirror, a GMC vehicle flashing its lights and honking its horn. This vehicle followed Turnage around the parking lot until he parked. The trail vehicle parked next to Turnage. Garr exited the vehicle and approached Turnage's car, wherein idle conversation began between the two gentlemen. At no time did Turnage exit, nor did Garr enter, the Turnage vehicle. None of the police observation vehicles

observed, as testified in Court, Turnage handing anything to Garr. In its brief to the Court of Appeals, the government cited volume 2 of the trial at 209 of Ratliff's testimony as having observed this take place. In review of this portion of the testimony, there is no testimony found in support of this allegation. After a brief interlude between Garr and Turnage, Garr returned to his vehicle. Shortly thereafter, Turnage's vehicle was approached by a police officer, and Turnage was removed from the vehicle and arrested.

On August 16, 1989, a Federal indictment was returned charging the Petitioner Turnage, Floyd Garr, and Fred Griffin with conspiracy and attempt to possess with the intent to distribute cocaine and the use of a firearm during

and in relation to a drug trafficking crime. Garr had a handgun in his vehicle in a pouch.

On September 19, 1989, Defendant Garr entered a guilty plea on the indictment, pursuant to an agreement with the government, wherein he was to testify against the other co-defendants. On November 15, 1989, trial was begun on the two remaining Defendants, Fred Griffin and Clarence Turnage. On November 17, 1989, the jury returned a verdict, finding Turnage guilty of both counts of the indictment and acquitting Griffin on both charges.

The testimony of Floyd Garr was admitted under the co-conspirator hearsay exception at the close of the government's case, despite the Trial Court's failure to find, prior to the

close of the evidence, that a conspiracy in fact existed and that Turnage was a part of that conspiracy. Garr's testimony was primarily that he scarcely knew Petitioner Turnage, but that the latter agreed to hand him a sack containing $40,000, and that Griffin had no knowledge of the events leading to the arrest. Not one scintilla of evidence connected Petitioner to the conspiracy other than co-conspirator Garr's testimony, which is the subject of this writ.

On March 7, 1990, judgment was entered, sentencing Turnage to 260 months on count I, 60 months on count II, and imposing an eight year term of supervised release. On March 15, 1990, an appeal was filed with the United

States Court of Appeals for the Sixth Circuit at Cincinnati (No. 90-5420).

On November 6, 1990, the Court of Appeals affirmed the Petitioner's conviction. It is from this ruling that this writ of certiorari is requested.

REASONS FOR GRANTING THE WRIT

In affirming the decision by the Federal District Court, the Court of Appeals for the Sixth Circuit rendered a decision in conflict with this Honorable Court's holdings in Bourjaily v. U.S., 43 U.S. 171, 97 L.Ed.2d 144 (1987), and its own decision in U.S. v. Enright, 579 F.2d 980 (1978).

Further, the Sixth Circuit's other holdings are in conflict with other decisions of other Federal Courts of Appeals on the issues presented.

ARGUMENT I: CONSPIRACY WAS NOT PROVEN BY SUBSTANTIAL INDEPENDENT EVIDENCE.

Reversible error was committed, in that a conspiracy was not proven through independent evidence, and the judge failed to hold such at the conclusion of the evidence. A statement by a co-conspirator is taken out of the realm of hearsay if offered against a party, if made during the course of and in furtherance of a conspiracy. Federal Rule of Evidence 801(D)(2)(E). However, before these statements can be taken out of the realm of hearsay, the Defendant against whom these statements are used must be a member of that conspiracy. The Fifth Circuit Court of Appeals declared that before a statement from a

co-conspirator can be admitted into evidence, the government must make a significant showing, by independent evidence, of the conspiracy of one or more other Defendants. U.S. v.James, 590 F.2d 575 (1979); U.S. v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41, L. Ed. 2d 1039 (1974). The only evidence presented by the government that linked Petitioner Turnage in any way to the events that took place at the McDonald's was the testimony of Floyd Garr. Even though Garr had testified that he had several conversations with Petitioner Turnage, there was no substantiation through any independent corroborative evidence that any of these such meetings took place. Thus, there was no preliminary finding that a conspiracy existed, or that Turnage or Griffin were a part of that

conspiracy. U.S. v. Apollo, 476 F.2d 156, (5th Cir., 1973). The Trial Court erred by not requiring the government to present its proof of the conspiracy and Turnage's involvement in that conspiracy prior to the hearsay testimony being presented to the jury, and no finding was made by the Court at the close of the government's case.

Under U.S. v. Vincent, it is an acceptable method for the Trial Court to allow such hearsay statements to be entered into evidence, however, with the understanding that the government must demonstrate the admissibility by preponderance of the evidence. If such a method is chosen by the Court, then the Court should stress to the government that it is only subject to the defendant's continuing objection;

and that the prosecution would be required to show that there was a conspiracy, and Petitioner was involved. When the government, at the close of its evidence, had failed to show that there was a conspiracy and that Turnage was a part of that conspiracy, then the Trial Court should have declared a mistrial or made the proper admonishment to the jury. 606 F.2d 149 (1979); Fed. Rule of Evid. 104(a), 801(d)(2)(E). The government did not fulfill its requirement under Apollo, supra, or Vincent, supra. The only independent evidence that the government had linking Turnage to Garr at all is the fact that Garr was honking his horn and blinking his lights to attract Petitioner's attention in the parking lot of McDonald's, and was then later talking

to Turnage in that same parking lot. It is important to point out that, prior to the arrest date, no government agents or informants talked to Turnage or saw Turnage and Garr, together. Further, none testified that they saw Turnage hand anything to Garr, or testified as to the substance of the conversation between Garr and Turnage on August 8, 1989. However, government agents did testify that they saw Garr exiting the McDonald's store, prior to Petitioner's arrival, with a bag that he did not take into the store. Other than Floyd Garr's questionable testimony, the only testimony that Petitioner Turnage took any part in this sham sale came from Darryl Ratliff, a police officer, who testified, at the detention hearing, that he was in the best position to see.

Further, Ratliff testified that he was shielded from Garr during the time he was at Turnage's automobile; thus, he could not see anything. This testimony was later changed at trial. In Bourjaily v. U.S., 47 U.S. 171, 97 L.Ed.2d 144 (1987), the guiding principles set out that a preliminary showing of the reliability of the out-of- Court statement must be made before a co-conspirator's hearsay statements can be admitted into evidence. In Bourjaily, the federal agents confirmed the indisputable involvement of a third party (Princess Bourjaily), recruited by the co-defendant, who dealt directly with the agents. One agent had an extended conversation with Bourjaily concerning the quality and purity of the cocaine he

wished to buy, as another agent listened to both sides of the conversation. Unlike the instant case, the government clearly showed the reliability of the out-of-Court statements in Bourjaily which warranted the admissibility of the co-conspirator's testimony. With the large cadre of the police and government personnel available to document the transaction between the undercover agents, Garr, and Turnage, no such documentation was obtained to show that there was a conspiracy involving Turnage. Likewise, the only recordings of any conversations between government agents and informants was that of Garr, and, at no time during any conversation, was the name Clarence Turnage spoken. Notwithstanding this, Garr admitted in

open court that he had lied to Pargen and others about being a drug dealer and knowing others in the business. In U.S. v. Enright, supra, the Sixth Circuit said that "a co-conspirator's hearsay statement may be admitted if the government establishes a prima facie case by means of independent, non-hearsay evidence." It later stated that a determination under 104(a) is more demanding than a prima facie test and calls for the exercise of judicial fact-finding responsibilities by the trial judge (at 985). The judge in Petitioner's case did no more than make a passing remark about finding a conspiracy and his participation therein. This fell far below the judicial fact-finding standard set out by the Sixth Circuit. Because no

independent evidence was presented by the government, the Trial Court should not have allowed the jury to retire without admonishing them to disregard the hearsay testimony of Garr.

The government claims that no error was committed by the Trial Court, and that no objection was made to the introduction of the hearsay statements and that they were thereby waived. This position was also taken by the Court of Appeals. It is the contention of the Petitioner that the jury was given inadmissible evidence that so prejudiced him that any objections or cautionary instructions would have had no utility. U.S. v. Macklin, 573 F.2d 1046 (8th Cir., 1978) Because the Trial Court allowed the above declarations by Garr to be made in the hearing of the jury

and no independent evidence was presented to connect Turnage to the conspiracy, the Trial Court prejudiced Turnage to such a degree that it resulted in his conviction, notwithstanding insufficient evidence. Further, at the close of the government's case, Petitioner's co-counsel, Mr. Cunningham, moved for a directed verdict based on the lack of evidence, and also pointed out to the Court that there had not been a finding of a conspiracy. At this point, the Court did not find that there was substantial evidence to support the government's theory of conspiracy, that Petitioner Turnage was a part of that conspiracy, and that the conversations to which Garr testified were in furtherance of the conspiracy. It was

only after the Court had ruled on the motion for the acquittal by counsel, and after Mr. Spencer, also Petitioner's co-counsel, had pointed out that no finding of conspiracy had been made by the Court, that the Court then made a statement that it so found. This was plainly in error under 52B. Further, after the jury had been dismissed for the day and after the close of the defense in this action, the Court entertained a motion by Mr. Cunningham on behalf of Mr. Turnage, wherein he renewed his motion for directed verdict based on the previous reasons stated in the record. The Court again overruled these motions. Therefore, it is clear that this objection was preserved for appeal, and that this conviction should be reversed.

ARGUMENT II: THE COURT COMMITTED ERROR BY NOT SEVERING THE TRIALS OF CO-DEFENDANTS TURNAGE AND GRIFFIN.

On September 22, 1989, Turnage filed a motion for severance and separate trials between him and the co-defendant, Griffin. In an order dated October 13, 1989, the Court improperly denied this motion. By denying the motion and requiring Turnage to be tried with Griffin, the Court unfairly prejudiced Turnage to such a degree that he could not under any circumstances receive a fair trial. The government cited U.S. v. Gaye for the proposition that, in conspiracy cases, persons jointly indicted should be tried together; and this is particularly true where the offenses charged may be established against all the Defendants by the same

evidence. 567 F.2d 916 (9th Cir.), cert. denied, 435 U.S. 999 (1978). See also, U.S. v. Dye, 508 F.2d 1226 (6th Cir.) cert. denied, 420 U.S. 974, 55 S. Ct. 1395, 43 L. Ed. 2d 653 (1975); U.S. v. Echeles, 352 F.2d 892 (7th Cir., 1965). This is an accurate position, but the Petitioner believes that it was apparent to the government that the evidence presented primarily by its star witness, Mr. Garr, would be against Turnage and would completely exonerate Griffin. The Court erred by failing to sever the trials. The government strongly opposed the severance of the trials even though it knew, or should have known, that Garr would say that Griffin had absolutely no knowledge of anything that was going on. The government knew that, based on the testimony of Garr, and based on the

testimony of Griffin if he should decide to testify, there would be no way that the government could prove any of the charges against Griffin. With this knowledge, the government still proceeded to trial on both Defendants, knowing very well that it would only present evidence against Petitioner Turnage. Also, by doing this, the government knew it would put Turnage in such a bad light as to make the jury believe that the only party involved in any type of criminal activity was Turnage. Also, it would give the facade that the hearsay evidence was also being presented against Griffin, who would not object. Therefore, it is clear from the testimony at trial, just as Petitioner Turnage had anticipated in his motion for severance, that the government's

witness, Garr, would offer exculpatory testimony for co-defendant Griffin, and that, by doing, he would extremely prejudice Turnage. Furthermore, as revealed at the trial, the two co-defendants had completely separate defenses, and it would have taken different evidence to prove conspiracy, intent and knowledge of any criminal activity on the part of the two Defendants, even though they stood trial together. Although all the evidence presented at trial was admitted against Griffin, just as it was against Turnage, none of the evidence went toward the guilt of Griffin as it did against the guilt of Turnage. Thus, the reasons for severance and separate trial proposed by Turnage came to full fruition.

The government again pointed out that no motion for severance was made at the end of the evidence. Included in his motion for directed verdict, Petitioner Turnage, through his attorney, Cunningham, renewed all motions that had been previously made, to include this motion for severance. Thus, it was preserved. U.S. v. Swift, 809 F.2d 320 (6th Cir., 1987). In the Court of Appeals opinion, Pt. B, it inappropriately held that there was no showing of prejudice by Turnage. It is the Petitioner's contention that this was in error and that there was clear prejudice by the Court's allowing the two co-defendants to be tried together. This prejudice was such that it caused the Petitioner to be convicted by amassing a large amount of evidence,

disguised as evidence against both parties, when in fact it was clearly and with the knowledge and intent of the government to be against only one party, and that was Petitioner Turnage. It is this showing of prejudice toward Petitioner Turnage that required the Court to sever the trials of the two remaining Defendants pursuant to Federal Rule of Criminal Procedure 14. U.S. v. Galo, 763 F.2d 764 (6th Cir, 1985), cert. denied, 474 U.S. 1068 (1986).

ARGUMENT III: THE COURT OF APPEALS ERRED BY UPHOLDING THE RULING OF THE TRIAL COURT THAT THE MONEY SEIZED FROM TURNAGE'S VEHICLE WAS PROPERLY INTRODUCED AS EVIDENCE.

Under Federal Law, an inventory search is reasonable when conducted under police procedures in the ordinary course of business. South Dakota v. Opperman, 428 U.S. 364 (1976); U.S. v.

Ford, 872 F.2d 1231 (6th Cir., 1989). However, the search of Petitioner Turnage's vehicle conducted by the Lexington Police Department was not in the ordinary course of business, and was done specifically for the purpose of finding evidence that it believed to be in Turnage's vehicle. Upon the arrest of Petitioner Turnage in the parking lot in Winchester, Kentucky, the police officers and the agents had the right to search Turnage and had the right to search anything within the "grabbable" reach of Turnage. This only included the interior of the vehicle, as there was no probable cause to believe that any evidence of any crimes were present in the trunk of the vehicle. Therefore, the trunk of the vehicle should have been searched after a warrant had been

obtained. Officer Richard Cox, who testified at the suppression hearing, stated that the vehicle was towed from Winchester to Lexington, Kentucky, as normal routine, and taken to the Lexington-Fayette Urban County Police Department, wherein it was searched. Of all the surveillance cadre, police, federal and state drug enforcement agents that were present on the night of the arrest, none could testify that they saw Turnage exit his vehicle, and none could testify that they saw Turnage remove anything from the trunk of his car and hand it to Garr. Yet, they say that the search of the vehicle was not in violation of the U. S. Constitution and was based on an inventory search. Petitioner would submit to the Court this was based solely on the testimony

of the government's own witness, Garr, wherein he stated that his man was to give him $40,000 and he was to provide $5,000 of his own money in the purchase of $45,000 worth of illicit drugs, this being the agreement between Garr and the undercover police agent. There was no reason for the agents to believe that there were any drugs in the trunk of Petitioner Turnage's vehicle. According to their own statement, they alleged that Turnage was there to buy, not sell, drugs, and, also, the amount of money that he supposedly was to bring and give to Garr was $40,000. Thus, there was no reason for the government agents to believe that Turnage would have any more than $40,000 in his possession. The search of Turnage's trunk was not based on probable cause, but merely based on

government agents desire to search Turnage's car. A search of the trunk of Petitioner's vehicle was extremely unreasonable based on the facts. The vehicle was secure in the McDonald's parking lot, and an inventory search was not necessary. Further, the Petitioner contends that it is not routine for the Lexington Police Department to transport a vehicle from one city to another city without inventorying that vehicle prior to the arrival of any wrecker services being used. Thus, the search of the vehicle at the Lexington Police Department was not pursuant to the standard procedures of the Lexington Police Department, but was a result of a direct intention of the police to search Petitioner's vehicle regardless of the law. The Court of Appeals relies on the

fact that Petitioner Turnage did not present any evidence to refute Officer Cook's testimony that the search was done pursuant to standard operating procedures of the police department when the $8,000 was discovered in the trunk. Petitioner contends that it is not the Petitioner's burden to prove that it was not in the ordinary course of business for such a search to be conducted, but it is the police department's duty to prove that it is. The mere fact that Officer Cook stated that it was the ordinary procedure did not prove that it was such. There was no evidence presented to support the testimony of Officer Cook; therefore, it was in error for the Court to hold that such a search of Petitioner's vehicle was not violable of the Fourth Amendment, but in

accordance with a search done for the purpose of inventorying the vehicle. Opperman, supra. The only thing that remotely linked Turnage to the whole scheme of the purchase of drugs was the presence of the money in Petitioner's trunk, the presence of which did not violate the law. This evidence was so prejudicial that, when it was introduced to the jury, they could draw no other inference but that this money was also to be used for the purchase of illicit drugs. It is for the above stated reasons that Petitioner Turnage requests this Court to reverse the decision of the Court of Appeals upholding the determination by the Trial Court that the funds recovered from Petitioner Turnage's vehicle were admissible in evidence.

ARGUMENT IV: THE GOVERNMENT'S PRESENTENCE REPORT CONTAINED INFLAMMATORY, UNRELIABLE ASSERTIONS OF FACT WHICH OFFENDED DUE PROCESS.

The government's presentence investigation report (PSI) contained statements made by the Petitioner's alleged co-conspirator, upon whose testimony the Petitioner's conviction rested. Included among the co-conspirator's free ranging observation is the following: Garr, the co-conspirator, indicated that he was acquainted with Turnage's son and knew that Turnage and his son were in the drug business, and that the older Turnage was the "money man" for the family drug business. As the presentence report is the document used by government officials not only at the

sentencing hearing, but also before the parole board to determine such items as classification, custody, furlough, and halfway houses and the prospect of parole, it is important that these items contain accurate information, as mandated by Rule of Federal Criminal Procedure 32.

When items in the presentence report are objectionable, and the defendant or the defendant's attorney makes an objection to said items, then the Court is required to inquire into these matters to determine the validity of the same or to make a clear statement that these items were not in fact used to sentence the defendant. U.S. v. Stewart, 770 F.2d 825 (9th Cir., 1985). Various objections were made verbally at the hearing and in writing prior to the

hearing. At the presentence hearing held March 2, 1990, after the case was called, the Court asked if there were any objections to any portions of the presentence report. At that time the Court acknowledged that it was aware of the objections made by Petitioner's attorney, Mr. Cunningham, his objections having been made in writing to the Court on January 16, 1990. However, it was at this time that the Court decided that, for the record, discussions should be held on these objections. Thus, it was only after the Court's insistence that these matters be discussed, and after the Court decided that it would "trace this back" to determine what the genesis of these statements were, that the discussion took place leading Petitioner's attorney to argue that no

such statements were made available to him. These arguments were made in addition to the objections to the inclusion of such statements in the presentence report. They, like all of the other objections, were timely made. Further, the Court did not specifically state they were not to be used by the Court in its sentencing decision. Thus, they were preserved for review, contrary to the finding of the Court of Appeals.

Another objection was to paragraph number 29, wherein it was stated that "Mr. Turnage exercised a leadership role in the instant offense." This was another written objection that was pointed out in the sentencing hearing. There was no direct or indirect testimony to substantiate this allegation presented in the trial or any

other materials the government had collected on Turnage, but, like the other objection, this one was also overruled. Objections were made to paragraph 39, wherein it depicted a shooting incident involving Turnage where it was believed that Turnage was made out to be an assailant; but the true picture was that Turnage, a businessman, was being accosted by a gentlemen attempting to unlawfully retrieve money from him, and Turnage simply defended himself, when threatened with the use of physical force by way of a large stick. This objection also was overruled. However, the Court did sustain objections to the report which said that Turnage's physical condition was unknown. Evidence was presented to the Court that showed that Petitioner

Turnage did in fact have multiple myeloma, a severe form of cancer, and, as Turnage was told by physicians, that he probably had only three years to live.

It is clear, from reading the transcript of the sentencing hearing, that proper and timely objections were made to the inclusion of several statements of Turnage's involvement in drugs and his position as some sort of drug leader. The Court heard these objections, but overruled these objections and did not make a statement that this information was not included in its decision to impose the severe and unusual sentence of imprisonment of 260 months on count one, 60 months of imprisonment on count two to be served consecutively with the sentence on count

one, and impose a term of eight years of supervised release. Thus, Petitioner Turnage contends that the Court of Appeals committed a reversible error by holding that no objections were timely made and that any and all rights to an appeal on any objectionable material were thereby waived. Contrary to the government's position, the insurance of proper due process is never a wasteful consumption of the Court's valuable time, and a hearing should have been held.

This Court has long made it clear that due process restraints attach to the sentencing process in general and to the presentencing report in particular. Townsend v. Burke, 334 U.S. 736 (1948). Further, recent cases have been sensitive to the dangers of inaccurate

PSI material. In U.S. v. Messer, 785 F.2d 832 (9th Cir., 1986), the Court stated that, when a trial judge relies on materially false or unreliable information in sentencing a Defendant, due process rights are violated. U.S. v. Ibarra, 737 F.2d 825, 827 (9th Cir., 1984). The mandates of U.S. v. Stewart require that, when a Defendant challenges information in a PSI, the District Court must make findings concerning the challenged information or state that no such findings are necessary, because the Court will not rely on the disputed information in the sentencing. 770 F.2d 825 (9th Cir., 1985); U.S. v. Petito, 767 F.2d 607, 611 (9th Cir., 1985). No such findings were made by the Court, and no such statement was made by the Court that it would not

rely on the inaccurate and objected to information. Thus, due process was offended, along with Federal Rule of Criminal Procedure 32(c)(3)(D).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Sixth Circuit.

Respectfully submitted,
BERRY & CUNNINGHAM
COUNSEL FOR PETITIONER
1035 North Limestone Street
Lexington, Kentucky 40505
(606) 255-9223

BY: _____
SHIRLEY A. CUNNINGHAM, JR.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

UNITED STATES OF AMERICA

V.

CLARENCE TURNAGE a/k/a Bud Turnage

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 89-21

Shirley Cunningham, Jr.
Defendant's Attorney

THE DEFENDANT:

was found guilty on count(s) One and Two after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number
21 USC 846	Conspiring to distribute and possessing with intent to distribute cocaine	1
18 USC 924 & 2	Using firearm in relation to drug trafficking crime and aiding and abetting	2

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, which shall be due before the defendant is released from custody. The Court declines to impose a fine due to the defendant's financial condition.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
285-26-3139

March 2,1990
Date of Imposition of Sentence

Defendant's mailing address:
575 West Second St.
Lexington, Kentucky 40508

Defendant's residence address:
same as above

_____
Signature of Judicial Officer

Henry R. Wilhoit, Jr., Judge
Name & Title of Judicial Officer

March 7, 1990
Date

Defendant: Clarence Turnage
Case Number: Lexington Cr. 89-21

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 360 MONTHS on Count 1 and 60 MONTHS on Count 2 to be served consecutively to the sentence imposed in Count 1.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By_____
Deputy Marshal

Defendant: Clarence Turnage
Case Number: Lexington Cr. 89-21

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 8 YEARS.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

NOT FOR PUBLICATION

No. 90-5420

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CLARENCE TURNAGE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

BEFORE: MARTIN, RYAN and SUHRHEINRICH, Circuit Judges.

PER CURIAM. The indictment in this case was the result of a Drug Enforcement Agency ("DEA") sting operation during which Clarence Turnage, Floyd Garr and Fred Griffin allegedly agreed to purchase approximately three kilograms of cocaine from undercover DEA agents in a McDonald's parking lot in Winchester, Kentucky. On September 19,

1989, defendant Garr pled guilty to the charges in the indictment pursuant to an agreement with government attorneys. On November 15, 1989, trial commenced against Turnage and co-defendant Griffin. On November 17, 1989, the jury found Turnage guilty of conspiracy and attempt to possess cocaine with intent to distribute, in violation of 18 U.S.C. S 846 (count one), and use of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. S 924(c)(1) and (2) (count two). Turnage appeals both convictions on various grounds. The jury found Griffin not guilty on all counts. For the reasons stated below, we affirm Turnage's conviction.

A.

Turnage's first argument on appeal is that the district court erred in failing to suppress $8,000 in currency seized from the trunk of his gold Cadillac after it was impounded at the Lexington-Fayette Urban County Metropolitan Police Department. The trial court denied Turnage's motion to suppress, ruling that the $8,000 was seized pursuant to a valid inventory search. At the suppression hearing, Richard Cook, a member of the Drug Task Force of the Lexington-Fayette Urban County Metropolitan Police Department, testified that Turnage's automobile was confiscated from the McDonald's parking lot at the time of his arrest and

transported to the Urban County Police Department Headquarters. Cook further testified that he performed an inventory search of the vehicle in accordance with the standard department procedures and found $8,000 in the trunk of the vehicle wrapped in brown paper. Turnage did not offer any evidence to refute Agent Cook's testimony or otherwise establish that the search of his car was not in the ordinary course of police procedures.

An inventory search is reasonable when conducted under police procedures in the ordinary course of business. See South Dakota v. Opperman, 428 U.S. 364, 372, 96 S.Ct. 3092 (1976); United States v. Ford, 872 F.2d 1231, 1240 (6th Cir. 1989), cert. denied, 109 L.Ed.2d 309

(1990).[4] Because Turnage failed to introduce any evidence to rebut the government's showing that the inventory search was proper, the district court properly denied his motion to suppress.

B.

Turnage also appeals from the district court's denial of his motion for a separate trial from co-defendant Griffin. Normally, co-conspirators are to be tried together absent a showing of

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[4]The defendant cites Kentucky law for the proposition that evidence seized in the conduct of an inventory search is inadmissible. However, federal law, not Kentucky law, controls the admissibility of such evidence in a federal court proceeding. See United States v. Pforzheimer, 826 F.2d 200, 204 (2d Cir. 1987); United States v. Rickus, 737 F.2d 360, 363-64 (3rd Cir. 1984).

severe prejudice. United States v. Dempsey, 733 F.2d 392 (6th Cir.), cert. denied, 469 U.S. 983 (1984). Turnage has made absolutely no showing of prejudice in this case. Further, Turnage's attorney failed to renew his motion for severance at the close of all the evidence at trial. Accordingly, any right to severance, had it existed, has been waived. United States v. Swift, 809 F.2d 320, 323 (6th Cir. 1987).

Turnage next argues that his conviction should be overturned on the grounds that inadmissible hearsay evidence was admitted at trial through the testimony of co-conspirator Floyd Garr. Generally, a co-conspirator's statements are not considered hearsay. Fed. R. Evid. 801(3)(2)(E). Moreover,

Turnage's attorney never objected to Garr's testimony at trial, nor did he seek to have Garr's testimony excluded prior to trial. Accordingly, Turnage's objections to Garr's hearsay statements, if any, are waived. United States v. Martin, 757 F.2d 770 (6th Cir.), cert. denied, 472 U.S. 1029 (1985).

Turnage's final argument is that the district court improperly allowed a statement made by Floyd Garr at the time he decided to cooperate with the government to be included in his pre-sentence report. In the statement, Garr indicated that he was familiar with Turnage's son and that he knew the elder Turnage was the 'money man' for the family drug business. Because Turnage did not object to the accuracy of the

statement at the pre-sentence hearing, his objection to the pre-sentence report has also been waived. United States v. Causey, 834 F.2d 1277, 1283 6th Cir. 1987), cert. denied, 486 U.S. 1034 (1988) (objections different than those made before the lower court are not preserved for appeal).

AFFIRMED

MANDATE ISSUED: NOVEMBER 29, 1990

NO COSTS TAXED